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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. EARL LEE MCBRIDE, Defendant and Appellant.	D054264 (Super. Ct. No. SCD213564)

APPEAL from a judgment of the Superior Court of San Diego County, Richard Whitney, Judge. Affirmed.

I.

INTRODUCTION

Defendant Earl Lee McBride appeals from a judgment of conviction and sentence. A jury convicted McBride of possessing cocaine base after police officers found rock cocaine in one of two wallets that McBride was carrying during a parole search that the officers conducted after they stopped the vehicle in which McBride was a passenger. The

jury also found true the allegations that McBride had suffered two prison prior convictions and two strike prior convictions. The trial court struck one of McBride's strike priors and sentenced him to eight years in prison.

On appeal, McBride contends that the trial court erred in denying his motion to suppress the drug evidence. McBride maintains that the court should have suppressed the evidence in question because the court made statements later in the proceedings that indicated the court did not believe that the officers had probable cause to stop the car in which McBride was a passenger. McBride further contends that the trial court erred in denying him deferred entry of judgment pursuant to Penal Code[1] section 1000, which provides for deferred entry of judgment for certain first-time drug offenders. McBride also contends that the trial court erred in relying on the same factor to impose two one-year enhancements and also to impose an upper term sentence. Finally, McBride asks this court to review the record of the in camera *Pitchess*[2] hearing to determine whether the trial court properly decided McBride's motion for discovery of the police officers' personnel files.

We conclude that there is no basis on which to reverse the trial court's ruling on McBride's motion to suppress the drug evidence, since the trial court's statements on which McBride relies do not indicate that the court did not believe that the officers had

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1 Subsequent statutory references are to the Penal Code unless otherwise indicated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

probable cause to initiate the traffic stop.[3] We also reject McBride's contention that he was eligible for deferred entry of judgment under section 1000. McBride had previously had his parole revoked and had not successfully completed his reinstated parole, as a result of his arrest for the current offense. His failure to successfully complete his parole excludes him from eligibility for deferred entry of judgment. We further conclude that McBride forfeited his challenge to the trial court's sentencing decision by failing to object to the court's purported use of a single factor to impose sentences on the enhancements and also to impose an upper term sentence. Finally, after reviewing the documents relevant to McBride's *Pitchess* motion, we conclude that the trial court properly declined to disclose any information from the officers' personnel files. We therefore affirm McBride's conviction and sentence.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution's case*

On the morning of May 12, 2008, San Diego Police Officers Adam Schrom and Scott Brengi were on patrol in downtown San Diego. They noticed a car eastbound in the middle of K Street, driving slowly. That car and the patrol car approached the intersection of K Street and 16th Street at the same time. The officers noticed that the

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[3] A traffic stop need not be supported by probable cause; reasonable suspicion of a Vehicle Code violation or other offense is sufficient. (*People v. Watkins* (2009) 170 Cal.App.4th 1403, 1408-1409.) Nevertheless, the trial court concluded that the higher standard of probable cause had been met.

driver of the car was not wearing a seat belt. After the driver made a left-hand turn at the intersection, the officers proceeded to conduct a traffic stop.

Police identified the driver of the car as Ivan Mosley. McBride was a passenger in the car. The officers determined that both men were on parole. The officers directed the men to get out of the car. After the two men got out of the car, the police officers conducted parole searches of them. McBride had two wallets in his possession. Officer Schrom looked through McBride's belongings, including the two wallets. Schrom opened a black wallet but did not take anything out of it. Another officer who had arrived to provide assistance also briefly looked through the black wallet.

Officer Brengi was called away from the scene for approximately 10 minutes, to respond to a disturbance at a nearby liquor store. When he returned to the scene of the traffic stop, Brengi picked up the black wallet and felt a lump inside the wallet. Curious to know what the lump was, Brengi removed a trolley ticket from the wallet and found a piece of rock cocaine that weighed approximately 2.27 grams inside. The officers placed McBride under arrest.

2. *The defense*

Mosley had known McBride since they were in prison together approximately two years prior to the incident. McBride had been living with Mosley since being released from custody a few weeks earlier. Mosley testified that McBride does not smoke crack cocaine.

Mosley first noticed the patrol car when it was approximately a quarter mile away. The patrol car drove through a stop sign and pulled behind Mosley. The officers never

informed Mosley why they had stopped him. Mosley testified that he was wearing his seatbelt at the time, and that he had been driving on the right side of the road. According to Mosley, the officers removed him from the car and handcuffed him before asking his name or his parole status.

McBride testified that he had found the black wallet on either May 10 or 11 at a downtown trolley station. McBride said that the wallet was empty when he found it, and that he had put his trolley ticket inside the wallet.

At the time officers stopped Mosley's car, McBride and Mosley were on their way to the parole office so that McBride could speak with his parole agent about having his parole transferred to Mississippi, where his mother lives, because she was ill. McBride was talking with his parole agent on a cellular telephone when officers stopped the car. McBride testified that both he and Mosley were wearing their seatbelts, and said that Mosley had been driving on the right side of the road.

McBride testified that he had never smoked crack cocaine and said that he had never seen the crack cocaine that was in the wallet before the officers found it.

B. *Procedural background*

By information filed May 14, 2008, McBride was charged with unlawful possession of cocaine base, in violation of Health and Safety Code section 11350, subdivision (a). The information also alleged that McBride had suffered two strike priors (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, and 668), and that the strike offenses had resulted in two prison priors, within the meaning of sections 667.5, subdivision (b) and 668.

On July 31, 2008, a jury found McBride guilty of possession of cocaine base. The jury also found true the allegations that McBride had suffered two prison prior convictions and two strike convictions.

The court sentenced McBride on October 15, 2008. After striking one of McBride's prior strike convictions, the court sentenced him to a total term of eight years in prison, which included the upper term of six years on the substantive count, plus two additional years—one for each of the prison priors.

McBride filed a timely notice of appeal on December 9, 2008.

III.

DISCUSSION

A. *The trial court properly denied McBride's motion to suppress evidence of the rock cocaine found in his wallet*

McBride contends that the trial court erred in denying his motion to suppress evidence of the rock cocaine that police found in his possession during the parole search because statements the trial court made subsequent to the motion hearing indicate that the court did not believe that the stop and subsequent parole search were lawful.

1. *Additional background*

Shortly before trial, McBride filed a motion to suppress the evidence of the rock cocaine, pursuant to section 1538.5. The court held a hearing on the motion to suppress immediately before trial. The court heard testimony from Glenn Twilliger, McBride's parole agent; Officer Schrom; Mosley; and McBride.

Twilliger testified that on the date officers searched McBride, McBride was on parole. Officer Schrom, who was on patrol with Officer Brengi, noticed a car driving slowly down the middle of K Street. The driver was not wearing a seatbelt. Officer Schrom pulled the car over, and contacted the driver and his passenger, who was identified as McBride. The officer determined that both men were on parole.

Officer Schrom had Mosley get out of the car and conducted a parole search of him. Schrom then asked McBride to get out of the car, after which Schrom handcuffed McBride and conducted a quick parole search of him. In the process of conducting that search, Officer Schrom briefly looked through two wallets that McBride had in his possession. Officer Schrom did not remove anything from either wallet. After Officer Schrom finished, Officer Clayton "briefly went through everything." Later, Officer Brengi conducted a more thorough search of the two wallets and found a piece of rock cocaine in one of them. The officers then told McBride that they were placing him under arrest for possession of rock cocaine.

Mosley testified that he had been wearing his seatbelt and driving on the right side of the road when a patrol car drove past him, made a U-turn, and pulled him over. The officers did not tell Mosley why they had pulled him over, and did not ask him if he was on parole prior to handcuffing him, putting him in the patrol car, and searching his vehicle. Mosley recalled that there were approximately eight police officers present at the scene, and that four or five patrol cars appeared after he had been pulled over. Mosley was subsequently released and was never issued a ticket.

McBride testified that Mosley had been driving him to see his parole officer when the police pulled them over. McBride was certain that Mosley was wearing his seatbelt at the time because McBride had earlier told Mosley to put on his seatbelt. Mosley had been driving on the right side of the road, not in the middle, at "no more than 15, 20 miles an hour." At a stop sign, Mosley made a left turn. Just after that, the police car came up behind them and turned on its lights.

A police officer asked Mosley for his driver's license and registration, and asked McBride for identification. McBride told the officer that he did not have identification because he had just recently been released from custody. The officer asked McBride if he was on parole, and McBride gave the officer his parole papers. The officer then asked Mosley if he, too, was on parole. When Mosley replied that he was on parole, the officer asked both men to get out of the car. No police officer ever mentioned anything about Mosley not wearing a seatbelt.

Defense counsel argued that this was a case of "driving while black," that there had been no Vehicle Code violation and, thus, there was no probable cause to support the traffic stop. The prosecutor contended that Officer Schrom had observed driving violations that justified the stop.

The trial court denied McBride's motion, stating, "Based on the evidence presented, the court does find there was probable cause for the stop and subsequent arrest. Therefore the 1538.5 motion will be denied."[4]

2. *Analysis*

McBride argues that "an examination of the record reveals statements by the trial judge indicating that he had *not* formed the necessary belief about the truth of the police account of what took place." According to McBride, this case is thus distinguishable from a typical case in which an appellant challenges the sufficiency of the evidence to support the court's findings because this case presents a situation in which the trial court made other statements during the proceedings that "belie[] the findings of fact [the court] is presumed to have made in denying the motion."

McBride points to two portions of the transcript to support his contention. McBride first refers to the trial court's statements during the following colloquy, which occurred during a discussion about the prosecutor's in limine motion to exclude, as irrelevant, evidence concerning the reason for the traffic stop:

> "The Court: . . . [¶] Let me rule on the issue of the seat belt and the stop. I don't want to get into a probable cause hearing in front of the jury because we've already litigated that and determined there was probable cause, so I want to avoid the issue of that at all times in front of the jury. I'm going to order that. [¶] As far as I think the motion to suppress was a close enough call, and I think it was a close call in this case. And I think that generally the reasons why he was

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4 Again, the trial court did not have to find probable cause for the traffic stop, but, rather, needed to find only that the officers had reasonable suspicion to justify the stop. By finding that the officers had probable cause to conduct the traffic stop, the court necessarily found that the lower standard of reasonable suspicion had been met.

> stopped do tie in closely with the general circumstances of the issues being presented by the defense, so I think it's important and integral and only fair to the defense in this case that that issue be raised. Again, as long as we're not talking about probable cause and arguing that in front of the jury.
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> "[Defense Counsel]: I'm not going to argue a motion to suppress in front of the jury.
>
> "The Court: I think the general circumstances [are] simple enough. The officer said he wasn't wearing a seat belt; they claim to the contrary. *I'm not so certain whether there was or was not a ticket issue.*
>
> "[Defense Counsel]: The officer said he – Mr. Mosley said he did not get a ticket." (Italics added.)

According to McBride, the court's reference to not being certain about whether there was a "ticket issue" suggests that "the court was saying that it was 'not so certain' whether or not there was a valid reason to issue a ticket." McBride contends that his interpretation of the court's statement is supported by the fact that the court had commented moments earlier that its ruling on the motion to suppress was a "close call."

Second, McBride maintains that certain statements that the court made during sentencing suggest that the court was uncertain about the legality of the traffic stop:

> "Okay. So that's the sentence in this matter, Mr. McBride. I can tell you this is one I struggled over. . . . You've been in and out of jail and prison most of your life. And a lot of it is fairly de minimis. *Certainly the offense at hand, the one we tried in front of the jury before me, had a lot of mitigating factors. The whole trial, the testimony, the allegations that maybe the evidence was planted, although the jury didn't find that to be the case*." (Italics added.)

McBride's reasoning with respect to these comments is as follows: "[T]he court referred to the allegations that the evidence had been planted as a 'mitigating factor,'

notwithstanding the jury verdict. A sentencing factor surely cannot be 'mitigating' unless it is found true. This reveals that the court did not actually believe the officers."

We reject McBride's suggestion that the trial court's statements reflect residual uncertainty as to whether the traffic stop was legal. First, it appears clear from the context that when the court stated that it was "not so certain whether there was or was not a ticket issue," the court was referring to its uncertainty as to whether police had *issued* a ticket to Mosley for failing to wear his seatbelt. Defense counsel's immediate response that Mosley had testified that he had not received a ticket strongly indicates that the court intended to say (or did say, but was misquoted in the transcript) the word "issued" rather than the word "issue."

Anticipating this argument, McBride contends that what appears in the reporter's transcript "is presumptively correct," and, thus, that this court must presume that the trial court meant to say that it was uncertain about the "ticket issue," which, McBride contends, means that the court was not certain that there existed a valid reason to issue a ticket. We need not ignore the context in which a transcribed statement has been made in interpreting what was said. To read the court's statement concerning the "ticket issue" as McBride suggests would require us to ignore the fact that the court had just reiterated, without equivocation, its determination that there was probable cause for the stop.

The court's statement about the mitigating factors in this case also does not suggest that the court was uncertain about its determination at the suppression hearing. There is no reason to think that the trial court's reference to mitigating factors meant that the court believed the allegations of evidence planting to be true. Even if we were to assume, as

McBride proposes, that the court was suggesting that the allegation that evidence had been planted was a mitigating factor in this case, it does not follow that the court must have disbelieved Officer Schrom's testimony that he pulled Mosley over because Mosley was not wearing a seatbelt and was driving in the middle of the road. The record simply does not support McBride's contention that the trial court did not in fact believe that the officers had probable cause to execute a stop of Mosley's vehicle.

The trial court made the comments in question while discussing matters unrelated to the issues that were raised at the suppression hearing. Viewing the court's comments as a whole, it does not appear that the court questioned Officer Schrom's version of events prior to the stop, or that the court was at all uncertain in its determination that probable cause existed. "[W]here a judge's statements as a whole disclose a correct concept of the law and its application, no secondary remarks should be deemed to have impeached his determination. [Citation.]" (*People v. Cartier* (1960) 54 Cal.2d 300, 313.) There is thus no basis for reversing the trial court's order denying McBride's motion to suppress the drug evidence found in his wallet.

B. *McBride was not eligible for deferred entry of judgment under section 1000*

McBride asserts that the trial court erred in denying him deferred entry of judgment under section 1000—a statute that provides for deferred entry of judgment in cases involving defendants who plead guilty to first-time charges of specific drug-related offenses (including the offense with which McBride was charged), and who meet six eligibility requirements. (See § 1000, subd. (a).) Subdivision (a)(4) provides that a defendant is not eligible for deferred entry of judgment if the defendant's record indicates

that "probation or parole has ever been revoked without thereafter being completed." McBride contends that although he may be considered ineligible for deferred entry of judgment "under the 'literal' terms of Penal Code section 1000, subdivision (a)(4)" because his parole had previously been revoked and he had not completed his parole term before his arrest in this case, this interpretation of the statute would lead to an absurd result. According to McBride, it is absurd that the commission of an otherwise eligible drug offense could render a defendant ineligible for deferred entry of judgment, which is what would occur when a defendant who has had his or her parole revoked and reinstated at least once fails to complete parole before his arrest for the new drug offense.

1. *Additional background*

After the hearing on the motion to suppress, defense counsel raised the question whether McBride was eligible for deferred entry of judgment under section 1000. The prosecutor asserted that McBride was not eligible because he was on parole at the time of his arrest for the current offense, and because he had suffered two prior strike convictions. Defense counsel argued that section 1000 did not require that a defendant not be on parole at the time of commission of the drug-related offense, or not have

incurred prior strikes. The prosecutor responded that strike priors render a defendant presumptively ineligible for probation.[5]

The trial court suggested that the attorneys could brief the issue, but defense counsel argued that McBride's eligibility for deferred entry of judgment under section 1000 could not be raised once trial commenced. The court then went off the record, presumably to discuss the matter further with counsel. Once back on the record, the trial court stated that McBride was presumptively ineligible for deferred entry of judgment under section 1000 because "he [has] an active parole hold."

2. *Relevant law*

"Sections 1000 to 1000.4 allow trial courts to defer the entry of judgment for drug offenders who are charged with and plead guilty to certain drug offenses and who meet other codified criteria." (*People v. Sturiale* (2000) 82 Cal.App.4th 1308, 1312-1313 (*Sturiale*).) The statutory scheme's purposes include "rehabilitation of the occasional drug user who has committed relatively minor drug offenses and conservation of judicial resources." (*Id*. at p. 1313)

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5 In the transcript, the prosecutor states that McBride was presumptively ineligible for "parole." However, given the context, it appears the prosecutor misspoke and intended to state that McBride was ineligible for probation. The prosecutor seemed to be equating deferred entry of judgment under section 1000 with probation (which he mistakenly called "parole"), even though deferred entry of judgment is not the same thing as probation. (See *People v. Mozurette* (2001) 24 Cal.4th 789, 795-797 [noting existence of similarities and differences between grant of probation and deferred entry of judgment].)

Section 1000 provides in relevant part:

> "(a) This chapter shall apply whenever a case is before any court upon an accusatory pleading for a violation of Section 11350, 11357, 11364, 11365, 11377, or 11550 of the Health and Safety Code, or subdivision (b) of Section 23222 of the Vehicle Code, or Section 11358 of the Health and Safety Code if the marijuana planted, cultivated, harvested, dried, or processed is for personal use, or Section 11368 of the Health and Safety Code if the narcotic drug was secured by a fictitious prescription and is for the personal use of the defendant and was not sold or furnished to another, or subdivision (d) of Section 653f if the solicitation was for acts directed to personal use only, or Section 381 or subdivision (f) of Section 647 of the Penal Code, if for being under the influence of a controlled substance, or Section 4060 of the Business and Professions Code, and it appears to the prosecuting attorney that, except as provided in subdivision (b) of Section 11357 of the Health and Safety Code, all of the following apply to the defendant:
>
> "(1) The defendant has no conviction for any offense involving controlled substances prior to the alleged commission of the charged offense.
>
> "(2) The offense charged did not involve a crime of violence or threatened violence.
>
> "(3) There is no evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections listed in this subdivision.
>
> "(4) The defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.
>
> "(5) The defendant's record does not indicate that he or she has successfully completed or been terminated from diversion or deferred entry of judgment pursuant to this chapter within five years prior to the alleged commission of the charged offense.
>
> "(6) The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.
>
> "(b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of

> subdivision (a) apply to the defendant. Upon the agreement of the prosecuting attorney, law enforcement, the public defender, and the presiding judge of the criminal division of the superior court, or a judge designated by the presiding judge, this procedure shall be completed as soon as possible after the initial filing of the charges. If the defendant is found eligible, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. This procedure is intended to allow the court to set the hearing for deferred entry of judgment at the arraignment. If the defendant is found ineligible for deferred entry of judgment, the prosecuting attorney shall file with the court a declaration in writing or state for the record the grounds upon which the determination is based, and shall make this information available to the defendant and his or her attorney. The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a postconviction appeal."

Pursuant to the terms of subdivision (b) of section 1000, the determination as to a defendant's eligibility for deferred entry of judgment is made by the district attorney, not the court. "The district attorney's preliminary screening for eligibility pursuant to the statutory criteria is not a judicial function." (*People v. Paz* (1990) 217 Cal.App.3d 1209, 1217.) Thus, "[i]n a variety of contexts, most courts considering the question whether the district attorney's unilateral determination of ineligibility is subject to judicial inquiry have held the trial court has no power to conduct a judicial review of the determination. [Citations.]" (*Sturiale*, *supra*, 82 Cal.App.4th at p. 1314, fn. omitted.) Rather, the statute establishes that challenges to the district attorney's eligibility determination are to be made on appeal after conviction. (§ 1000, subd. (b).)

3. *Analysis*

As a preliminary matter, McBride contends that the prosecutor and the trial court erred in concluding that he was ineligible for deferred entry of judgment because, in

reaching that conclusion, they relied on criteria not listed in section 1000, subdivision (a).[6] There is no dispute that McBride was charged with (and ultimately convicted of) violating Health & Safety Code section 11350, subdivision (a), which is a qualifying offense for which deferred entry of judgment may be available. The prosecutor thus had a duty to determine McBride's eligibility for deferred entry of judgment.

In this situation, it appears that the prosecutor raised two grounds to support his conclusion that McBride was ineligible for deferred entry of judgment under section 1000: (1) that McBride was on parole at the time he committed the instant offense, and (2) that McBride's prior strike convictions rendered him ineligible. Neither of these grounds appears to render a defendant ineligible for deferred entry of judgment, per se. For example, none of the criteria listed in subdivision (a) specify that a defendant may not be on parole at the time of the commission of the offense.[7] Similarly, the fact that a defendant has suffered a strike conviction does not, by itself, render him ineligible for deferred entry of judgment. (*People v. Davis* (2000) 79 Cal.App.4th 251, 256-258 [an otherwise eligible strike defendant may participate in deferred entry of judgment].) Thus,

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6 McBride also notes that the prosecutor and trial court "appeared to misunderstand their respective roles in the Penal Code section 1000 process" because it was the prosecutor's duty to determine McBride's eligibility, not the court's. Despite the fact that the trial court lacked authority to consider McBride's eligibility, the court nevertheless appeared to independently confirm the prosecutor's conclusion that McBride was ineligible for deferred entry of judgment.

7 Under the language of the statute, being on probation or parole, alone, does not disqualify a defendant from deferred entry of judgment. Rather, as we shall explain, it is the fact of still being on probation or parole after having had probation or parole revoked and reinstated that renders a defendant ineligible for deferred entry of judgment.

it appears that the prosecutor based his determination that McBride was ineligible for deferred entry of judgment on improper criteria. Further, although the prosecutor's determination should not have been subjected to judicial review by the trial court, the trial court nevertheless raised its own basis for finding McBride ineligible for deferred entry of judgment, i.e., that McBride was ineligible because he had "an active parole hold." This fact, alone, also does not appear to be one of the factors that would exclude a defendant from eligibility for deferred entry of judgment.

The failure of the prosecutor and/or the court to identify a valid ground for excluding McBride from eligibility for deferred entry of judgment does not require reversal, however, since the record discloses that McBride was in fact ineligible for deferred entry of judgment under subdivision (a)(4) of section 1000. Thus, any possible error on the part of the prosecutor or the court in considering the issue of McBride's section 1000 eligibility was harmless.

Subdivision (a)(4) of section 1000 provides that a defendant may be eligible for deferred entry of judgment for the listed drug offenses only if "[t]he defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed." In this case, it appears that McBride was paroled on July 15, 2007. On November 4, 2007, he was arrested for absconding supervision and was taken back into custody. It appears that his parole was revoked, that on or around December 1, 2007, he was ordered to finish his term, and that he was released from custody on April 30, 2008. Less than two weeks later, on May 12, 2008, McBride was arrested in the current case and a parole hold was placed on him. He thus had not successfully completed parole,

which had previously been revoked and reinstated, at the time he was arrested and charged with the current offense.

McBride acknowledges that, based on this record, he appears to fall within the literal terms of section 1000, subdivision (a)(4) because, as a result of the parole hold that was placed on the date of the current offense, "he had . . . not yet 'completed' the parole—he was still in the process of doing so." McBride nevertheless contends that interpreting the statute to mean that a defendant is ineligible for deferred entry of judgment if, at the time of his arrest for the drug offense, the defendant has not " 'completed' [his parole] by virtue of the arrest—and the subsequent parole hold—that ha[ve] brought him to trial," constitutes an absurd result. According to McBride, applying the " 'literal' terms" of section 1000 "would produce the anomalous result that *the commission of a deferred-entry-of-judgment-qualifying offense would render the defendant ineligible for deferred entry of judgment*." This, he maintains, "cannot be consistent with the purpose of the statute." For this reason, McBride requests that we interpret the statute in a manner that would allow a defendant who has had probation or parole revoked and reinstated, but who has not completed probation or parole as a result of being charged with a drug offense that would otherwise be one for which deferred entry of judgment was available, to be eligible for deferred entry of judgment.

Because McBride's claim requires us to construe subdivision (a)(4) of section 1000, we apply "well-established principles of statutory interpretation" to determine whether McBride meets the eligibility requirements of that provision. (*People v. Popular* (2006) 146 Cal.App.4th 479, 484.) "Penal Code sections must generally be construed

' "according to the fair import of their terms, with a view to effect its objects and to promote justice." ' [Citation.] When construing a statute, a court must first 'examine the words at issue to determine whether their meaning is ambiguous.' [Citation.] If statutory law is ' " 'clear and unambiguous there is no need for construction, and courts should not indulge in it.' " ' [Citations.]" (*Ibid*.) "But, 'the "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.' [Citation.] We do not apply the plain meaning of the statute 'when it would inevitably . . . frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results.' [Citation.]" (*Ibid*.)

The language at issue is sufficiently clear to allow us to determine its plain meaning. In order to be eligible for deferred entry of judgment, individuals who have had probation or parole revoked and then reinstated must have demonstrated an ability to successfully meet the terms of probation or parole by having *completed* their probation or parole term. A defendant who had has his probation or parole revoked and has not completed probation or parole, for whatever reason, does not meet the eligibility criteria of the statute.

We disagree with McBride's contention that applying the plain language of the statute leads to an absurd result. McBride asserts that in order for the provision to "meet the purpose of the statute," subdivision (a)(4) "should apply only where probation [or parole] is revoked for reasons *other than* the commission of the deferred-entry-of-judgment-qualifying drug offense."

"Rehabilitation is the primary goal underlying the diversion statutes, and the Legislature set forth eligibility requirements intended to render eligible those persons who are most likely to benefit from the diversion program. [Citation.]" (*People v. Disibio* (1992) 7 Cal.App.4th Supp. 1, 6 (*Disibio*).) When the provision was originally written in 1972, "section 1000(a)(4) provided that in order to be eligible for diversion a defendant had to have 'no record of probation or parole violations.' " (*People v. Bishop* (1992) 11 Cal.App.4th 1125, 1129, fn. 3.) "A 1975 amendment liberalized this eligibility requirement, which now allows for prior violations so long as 'defendant's record does not indicate that probation or parole has ever been revoked without thereafter being completed.' " (*Ibid*.)

Although the amendment to the statute may have "liberalized" this particular eligibility requirement by potentially rendering a greater number of defendants eligible for deferred entry of judgment, this does not mean that the amendment was intended to apply to every defendant who has had probation or parole revoked and reinstated. Rather, the Legislature could have determined that those defendants who have shown the ability to succeed on probation or parole by completing their terms are individuals who are likely to benefit from deferred entry of judgment, even if, at some point, they may have violated the terms of their probation or parole. An individual who has had parole revoked and reinstated and who then completes parole has demonstrated an ability to benefit from rehabilitative efforts; an individual who has had probation or parole revoked and reinstated but who is arrested for even a relatively minor drug offense *before* having completed probation or parole has not demonstrated the same potential to benefit from

rehabilitation. (See *Disibio, supra,* 7 Cal App.4th Supp. At p. 6 ["A person who shows willingness to abide by the terms of probation and complete the rehabilitative process is likely to benefit from diversion. . . . A person who does not successfully complete probation or fails to profit by probation conditions is unlikely to succeed in a diversion program."]

Excluding defendants from eligibility for deferred entry of judgment who have had their probation or parole revoked and reinstated, but who have not yet completed probation or parole before committing a first-time drug offense, is not an absurd result. We therefore have no reason to interpret subdivision (a)(4) in a manner different from its plain meaning.

C. *McBride forfeited his challenge to the trial court's discretionary sentencing determination*

McBride contends that the trial court erred by improperly using his prison priors both as the basis for two additional one-year enhancement terms, and also to support the court's decision to impose an upper term sentence. Section 1170, subdivision (b) provides, "The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

McBride contends that the only reasons the court gave for imposing the upper term were those that the court expressed in the following statement:

> "I can tell you this is one I struggled over. While you have a record of criminal conduct dating back to when you were a young man, it looks like [from] your probation report you were in jail at 18 or 19 maybe for truancy, says something about your mother having put you in jail instead of going to high school. You've been in and out of jail and prison most of your life. And a lot of it is fairly de

> minimis. Certainly the offense at hand, the one we tried in front of the jury before me, had a lot of mitigating factors. The whole trial, the testimony, the allegations that maybe the evidence was planted, although the jury didn't find that to be the case. But it wasn't the most significant offense in the world, but it certainly carried the most significant potential penalty as you know. If I left the probation recommendation as it came in, you're looking at 25 years to life plus two years. And in my mind that was just too harsh for the type of offense that was committed."

According to McBride, because the court "referred to McBride's prison past," and "[n]o other reason was given," we should infer "that the court's reason for an upper-term sentence was McBride's record of previous offenses resulting in imprisonment." This, he contends, was error because the court had already imposed two one-year enhancements based on those same prison priors.

The People assert that McBride has waived this argument by failing to object in the trial court. In *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the Supreme Court determined that "the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Id*. at p. 353.)[8] The Court further explained, "Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it doubled-counted a particular sentencing factor, misweighed

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8 Although denominated an issue of "waiver" in *Scott*, the People's contention here is more properly characterized as one involving an allegation of "forfeiture." (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9 [" 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' [Citation.]"].)

the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Ibid*.)

The *Scott* court reasoned, "Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. " (*Scott, supra,* 9 Cal.4th at p. 353.)

The *Scott* rule applies to appellate claims of improper double counting. Post-*Scott* cases agree that the forfeiture principle applies when a defendant fails to object to what he or she later maintains is an improper dual use of facts to impose the upper term. (See, e.g. *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1518; *People v. De Soto* (1997) 54 Cal.App.4th 1, 7-8.)

McBride contends that his case involves one of the exceptions to the "waiver" rule announced in *Scott*. According to McBride, his sentence was "unauthorized," in that the court had "no discretion to do what was done." "Although the cases are varied, a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*Scott, supra*, 9 Cal.4th at p. 354.) "[L]egal error resulting in an unauthorized sentence commonly occurs where the court violates mandatory provisions governing the length of confinement. It does not follow,

however, that nonwaivable error is involved whenever a prison sentence is challenged on appeal. [Citation.]" (*Ibid*.)

We disagree with McBride's contention that his sentence was "unauthorized" for purposes of application of the *Scott* rule. It is true that if the trial court had available to it *only* the facts of McBride's two prior prison convictions to support its sentencing choices, then the court would have had no discretion to make use of that fact both to impose enhancements and also to impose an upper-term sentence. However, that is not the situation presented in this case. Rather, the court could lawfully impose an upper term sentence under the circumstances of this case based on sentencing factors other than McBride's two prison priors. For example, among the aggravating factors identified in the probation report were McBride's lengthy criminal history—beyond the two convictions that resulted in prison sentences—as well as the fact that McBride was on parole at the time of the current offense. Further, the trial court could have sentenced McBride pursuant to the "Three Strikes" law, which would have resulted in a sentence of 27 years to life, but exercised its discretion to strike one of McBride's strikes and thereby significantly reduce the potential sentence. The fact that the court exercised its discretion not to impose a lengthy, indeterminate sentence under the Three Strikes law was a "factor reasonably related to the sentencing decision" of the court to choose an upper term rather than a middle term. (California Rules of Court, rule 4.420 (b) ["In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision."].) Thus, the trial

court clearly had the authority to lawfully impose both the upper term and the sentencing enhancements in these circumstances. (See *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775 [when an appellant claims that the trial court made impermissible dual use of a fact as both an enhancement and an aggravating factor, an appellate court looks to see whether the trial court could have based the aggravating factor on evidence other than that which gave rise to the enhancement, and, if so, the sentence stands].)

If McBride had properly objected to the court's failure to articulate the bases for its discretionary sentencing choices, the trial court could have clarified its reasons for choosing the upper term. This is precisely the type of situation that requires an objection in the trial court. We conclude that by failing to raise this claim of error at the time of sentencing, McBride has forfeited the claim.

D. *The trial court did not err in declining to disclose any portion of Officers' Schrom and Brengi's personnel files in response to McBride's Pitchess motion*

1. *Additional background*

Prior to trial, McBride moved for discovery of any personnel records of Officers Schrom and Brengi relating to the filing of false and misleading police reports, dishonesty, false or misleading declarations, false or misleading testimony or statements, acts of dishonesty, acts of moral turpitude, unlawful and excessive use of force, and any unlawful and/or dishonest acts done under color of authority.[9] The city attorney's office

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9 The court minutes referring to McBride's *Pitchess* hearing indicate that the records sought were those of Officers Schrom and J. Swett. This appears to be an error; the hearing clearly involved the discoverability of the personnel records of Officers Schrom and Brengi.

opposed McBride's motion. The trial court conducted an in camera review of the two officers' personnel records to determine whether any portion of the records was discoverable by the defense. After reviewing the records, the trial court denied McBride's motion.

The record on appeal did not contain either a transcript of the in camera proceedings or copies of the records that the trial court reviewed. McBride requested that this court review the records presented at the in camera *Pitchess* review proceeding to independently determine whether the trial court was correct in denying his motion. The People did not oppose this court reviewing the sealed transcript and personnel records relating to the trial court's in camera hearing.

This court requested the sealed transcript and personnel files from the trial court, and received the documents on November 16, 2009. We hereby augment the record on our own motion, and order that the documents are to remain sealed. (See California Rules of Court, rule 8.340, subd. (c).)

2. *Analysis*

"[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both ' "materiality" to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that

serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179 (*Gaines*).)

"If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], 'the trial court should then disclose to the defendant "such information [that] is relevant to the subject matter involved in the pending litigation." ' [Citations.]" (*Gaines, supra*, 46 Cal.4th at p. 179.)

The trial court reviewed the requested records in camera and determined that they contain no information relevant to the subject matter of McBride's case. We have reviewed the transcript and the personnel records that the trial court considered. Our review confirms the trial court's determination: The confidential personnel records do not contain any disclosable information. The trial court thus properly declined to disclose any items from the officers' confidential records.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

McDONALD, Acting P. J.

McINTYRE, J.